No. 4077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUSTAVE JOHNSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

This is a writ of error to the United States District Court of the Northern District of California to reverse the sentence of conviction of plaintiff in error for a violation of the "Harrison Narcotic Act."

On March 27, 1923, plaintiff in error, Gustave Johnson, and one Ray Croxall were indicted for a violation of the Harrison Act in an indictment of one count, wherein they were charged as follows:

"did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that they did knowingly, wilfully, unlawfully and feloniously have in their possession a certain preparation and derivative of opium, to wit, one can morphine and one finger stall containing approximately a total of 194 grains of morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine."

The defendant Croxall pleaded guilty and upon trial of the plaintiff in error, who will hereafter be called the defendant, he was convicted as charged and thereupon was sentenced to be imprisoned in the United States Penitentiary at McNeil Island for three years and six months.

At the trial the government showed, among other things, by the testimony of Police Officer Dowell, that on March 23, 1923, two Police Officers of San Francisco accompanied defendant Johnson and Croxall to 882 Fulton Street, San Francisco, where the defendant said he resided, and said it was his place. Apparently the officers were investigating a suspected theft. The premises consisted of two rooms occupied by Croxall, defendant and a woman. The rear room, otherwise called kitchen, was occupied by Croxall. A trunk was found. Defendant

told the officers that the trunk belonged to him. It was found to be locked. The officers tried to open it when defendant Johnson interrupted, "Do not break the trunk, I will give you the key." On opening the trunk in the top drawer the officers found a can and asked defendant Johnson what it was and he said it was morphine and belonged to him. (Trans. of Rec., p. 31.) Upon a further search of a bureau drawer in the front room the officer found a number of needles which Johnson admitted belonged to him and in the rear room they found another morphine can and defendant Johnson admitted that belonged to him, and had contained morphine, and that he had used it, and that he had bought the morphine up north. In the same room that was occupied by Croxall, defendant Johnson told the officer to look on the shelf and that he would find the needle and syringe that is used in taking the shots of morphine. Upon a search, the officer found it as stated. The can was produced and described as being in the same condition as when found, except that a sample was taken for analysis; the can did not have stamps on it of any kind (Trans. of Rec., p. 32). The witness further stated that Johnson did not have the finger stall of morphine on him, that Croxall did. The finger stall was found on Croxall when he was searched at the City Prison. Johnson had requested the officer not to break the trunk open, stated that he had the keys and raised up off the chair and went through his clothes and got the keys and threw them to the

officer, a distance of probably ten feet. (Trans., p. 34 and 35.)

Witness Love, a chemist, identified the exhibit, said he made a chemical analysis of it, and that it contained morphine, and that morphine is a derivative of opium. The can and morphine taken from the trunk were put in evidence.

Witness Frederickson testified that he was present on the occasion mentioned, March 23, 1923, and heard Dowell ask who the trunk belonged to and defendant Johnson said "to me." Witness saw Dowell open the trunk, take the can which was about one-half full, saying, "Why, that is morphine." Thereupon defendant Johnson admitted that it was morphine, and being asked "are you selling this stuff?" he said "I got that for my own use." Being asked how long it would take to use the amount he had left, he said "I am off the stuff now, I only use a very small amount of it; probably it will take six months to a year to use." After a further search the officers found some hypodermic needles not complete. Thereupon Detective Dowell asked defendant Johnson where the remaining portion was and he said, "You will find them under the dish rag in the kitchen"; that was the room occupied by Croxall. The officers found another can in the kitchen. Johnson said that the can belonged to him and that it had contained morphine. There were no stamps on the cans. The cans produced in evidence were described as being in the same condi-

tion as when taken, except that a sample had been taken from the larger of the two cans.

The defendant Johnson in his own behalf testified that he lived at 882 Fulton Street, was addicted to the use of narcotics since 1908, and that he was not a dealer in narcotics; that he was not present when the keys were given to the officers and did not give the keys to them to open the trunk; that he did not own the finger-stall of morphine. He admitted, however, that when the can of morphine was found, the officers said it was morphine, whereupon defendant said he guessed it was; said it belonged to him. After certain other testimony was taken, defendant Gustave Johnson was recalled and testified, "I never imported any narcotics into the country. I never manufactured any narcotics. I never produced any narcotics. I never compounded any narcotics. I never sold any. I never dealt in any narcotics and never dispensed a narcotic. I never gave any narcotics away. I had in my possession certain narcotics. I had them for my own use. I have been addicted to the use of narcotics ever since 1908." At the close of the testimony the defendant moved for a directed verdict on the ground that the evidence was illegally seized, that the indictment did not state a public offense, and that the evidence was insufficient to convict the defendant. The motion was denied.

At the trial the defendant proposed three certain instructions appearing at pages 55 and 56 of the

Transcript of Record. The court refused to give the instructions and the defendant excepted.

Although some seven assignments of error containing various sub-paragraphs were made by the defendant, he now presses but four points in his brief, to wit:

1. No crime is set forth in the indictment.
2. There are two distinct defenses against two different persons improperly joined in an indictment which consists of only one count.
3. The evidence was insufficient to convict the defendant, and
4. There was error committed in the court's refusal to give certain instructions.

1. THE INDICTMENT WAS SUFFICIENT TO STATE A PUBLIC OFFENSE UNDER SECTION 8 OF THE HARRISON ANTI-NARCOTIC ACT.

The portion of the Act material provides as follows:

> "It shall be unlawful for any person not registered under the provisions of this Act and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs * * *

The drugs referred to were narcotic drugs, including morphine. The defendant's contention as to

insufficiency of the indictment is based upon the ruling in the case of

Jin Fuey Moy, 241 U. S. 394.

But it is apparent that the pleader in the instant case, having that very case in mind, framed an allegation to cover the element said in the opinion referred to to have been necessary but omitted; that is to say, that the defandants must be shown to have been persons required to register under the provisions of the Act. In the case at bar the indictment contained the express statement:

> "Said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid, as amended, being the Act of December 17, 1914, as amended February 24, 1919."

It was further alleged in the indictment that,

> "Said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine."

It thus appears that the question here is not the question that was involved in the *Jin Fuey Moy* case. The real contention of the defendant is thus seen to be that the allegation quoted is a nullity, or, as defendant Johnson says at page 11 of his brief,

> "The indictment indulges in a bald conclusion of law that he is a person required to register and pay a tax."

The authorities cited, it is submitted with deference, throw no light upon this question, nor do they sustain the position of plaintiff in error that the averments in question are wholly nugatory or to be disregarded.

It is the contention of the defendant in error here that the allegations so attacked are mixed averments of law and fact and thus sustainable.

In considering the sufficiency of the indictment here it may be useful to note certain canons of construction in regard to indictments which have come to be well established:

(a) The rules governing criminal pleadings, while no less protective to an accused, have come to be less technical and more practical and decisions rejecting technical objections to an indictment are not now the exception. And this is eminently so from a consideration of the provisions of Section 1025 of the Revised Statutes.

Jelke vs. U. S., 255 Fed. 264, 274.

This authority, on page 274, tersely states the doctrine and cites significant cases bearing upon the point, including a pertinent quotation from the case of

Harper vs. U. S., 170 Fed. 385, 392.

(b) Defects of form in an indictment are not available on writ of error after verdict.

Section 1025 R. S.

Connors vs. U. S., 158 U. S. 408, 39 L. Ed. 1034.

New York Central etc. Company vs. U. S., 212 U. S. 481, 53 L. Ed. 613, 623.

Armour Packing Company vs. U. S., 209 U. S. 56, 84, 52, L. Ed. 681, 695.

(c) Upon the whole, an indictment cannot be held to be insufficient if it follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense.

Young vs. U. S., 212 Fed. 967, 968.

(d) Under the provisions of Section 1025 of the Revised Statutes no defect in an indictment which amounts to a defect of form is available after verdict.

Tested by the provisions of paragraph (c) above quoted, it is seen that the indictment is sufficient and contains sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, especially is it such that he could plead his acquittal in the instant case in bar of any subsequent prosecution for the same offense. The defendant Johnson seems to question the latter, but it is manifest that if he were ever prosecuted in the future for the precise possession of contraband drugs complained of, he could defend

by virtue of his former acquittal regardless of the theory or fact under which he would have been required to register. The crime could be easily identified in any future prosecution.

As showing the insufficiency of the allegation in question, the case of

Pendleton vs. U. S., 290 Fed. 388,

is cited. But it is apparent that in that case the court reasoned that the particular averment that the defendant was a practicing physician limited the general statement that he was a person required to register so that the averment amounted to no more than that the defendant was a practicing physician, and the court further held as such he was not required to register unless he dispensed narcotics. The decision is not an authority that the averment made use of here is insufficient. On the other hand, the Circuit Court of Appeals for the Fifth Circuit, in the case of

Miller vs. U. S., 288 Fed. 816, 817,

sustained a count of an indictment which appears to be precisely the same as the case at bar. It was there said:

> "As to the fourth count, that was sufficient. It fully charges an unlawful possession of morphine, giving the time and place of such unlawful possession, by one not registered who was a person required to register. *United States vs. Jin Fuey Moy,* 241 U. S. 394."

In charging statutory crime based upon statutes containing references to situations in other statutes, it is necessary to make terse statements of mixed law and fact at times to plead the statutory connection. Such averments cannot be said to be bald conclusions of law and thus nugatory and worthless. In the case of

Dean vs. U. S., 266 Fed. 695,

where the use in an indictment of the words "original stamped package" was questioned by defendant, this court said:

> "When the words are construed with reference to context and other provisions of the law there can be no question of their meaning."

It will be observed that in the case of

Jin Fuey Moy vs. U. S., supra,

the Supreme Court in phrasing its holding said that the words "any person not registered" in Section 8 must be taken to refer to the class with which the statute undertakes to deal, *the persons who are required to register by Section 1.* The Supreme Court thus makes use of the words *"persons who are required to register"* by Section 1 as expressive of the omitted element of the indictment.

Accordingly, it cannot be said here that the indictment wholly fails to set forth the element in question; at best it is a mere matter of an uncertainty or imperfection as to form only.

> "It is not necessary that an indictment in describing a statutory offense shall use the very words of the statute, as any other form of expression is sufficient which fully describes the evidence."
>
> *Thrope vs. U. S.,* 276 Fed. 348, 350,

and the Circuit Court of Appeals, in so declaring, cites the cases of

> *Dunbar vs. U. S.,* 156 U. S. 185, 191, 39 L. Ed. 390.
>
> *Lemon vs. U. S.,* 164 Fed. 953, 957.

In the case of

> *Olsen vs. U. S.,* 287 Fed. 85, 90,

it was declared that an indictment under the statute for using the mails to defraud need not follow the language of the statute, but it is sufficient if the averments bring the charge within the substance and true meaning of the statute; and that every element of the offense which is contained by Section 215, (the section referred to,) was within the phrase of the indictment under review and thus that the failure to plead certain quoted words was a matter of form only.

We conclude, therefore, in the light of the foregoing authorities that the indictment in the instant case contained in some form of statement every element of the charge necessary to be stated.

At best it could only be claimed that the averment

in question is uncertain or too general. But as to such a claim it is submitted that the situation here is not altered on account of the interposition by defendant of what is called a "special" demurrer. It has been held that such a demurrer is no more than a general demurrer in which reasons therefor are stated rather than in a separate brief. The analogy drawn from the special demurrer provided for in civil practice in California and other states is not sound. The so-called special demurrer is not admissible in Federal Criminal practice. If interposed, it is to be considered as a case of general demurrer, in which event the indictment is good if it states in some form the necessary averments.

U. S. vs. French, 57 Fed. 382, 391.

U. S. vs. Patterson, 59 Fed. 280, 281, 284.

This is not to say that a defendant has not a remedy when confronted by an indictment against him containing an averment which is either uncertain or too general. It is well understood that in such a case he has a right to demand a bill of particulars which in a proper case is granted and which gives all the information necessary to prepare for trial. Such a bill of particulars so furnished on his demand effectually limits the general averment in the indictment to the particulars specified. And there is good reason and sound consideration of policy for the distinction here claimed; for if a so-called special demurrer for uncertainty were allowable and, in a given case sustained, it would

nullify the particular indictment and require the entire submission of the case anew to a grand jury, and this although the uncertainty may be comparatively slight. On the other hand, if the defendant be confined in such a contingency to a bill of particulars, he obtains all the information necessary and the government is not put to the expense and delay and possible miscarriage of justice which would result if the indictment were entirely nullified and the cause submitted anew to the grand jury.

In Federal procedure it has been repeatedly held that the proper remedy is for the defendant to demand a bill of particulars. Thus in the case of

Dean vs. U. S., 266 Fed. 695, 696,

this court said of the case there:

> "When the words are construed with reference to context and other provisions of the law there can be no question of their meaning. *If they seemed obscure or indefinite to the plaintiff in error, he had his remedy in the court below by demanding a bill of particulars.*"

And in the case of

Wilson vs. U. S., 275 Fed. 307, 310,

it was decided that if an indictment fails to apprise defendants of the nature of the accusation with that degree of certainty to which they are entitled, they had a right to ask for a bill of particulars. And cases are cited illustrating Federal Practice in that regard.

In the case of

Dierkes vs. U. S., 274 Fed. 75, 79,

it is said:

> "That there is in the courts of the United States a well settled practice of requiring and giving bill of particulars in criminal cases, for the purpose of informing a defendant with respect to time, place and other details, and thus to enable him to meet the charge appears by these further citations;" (the court thereupon citing cases from the Supreme and other Federal courts).

It was further declared in the same case that a bill of particulars once made and served concludes the rights of the parties and that he who has furnished the bill must be confined to the particulars specified as closely and effectually as if they constituted essential allegations in a special declaration. It is true that such a bill will not cure a fatal defect in an indictment, but here we have an averment in question in a terse and clear form, and the only criticism that can be seriously made to it is that it is too uncertain or too general.

The defendant in the instant case could have moved for a bill of particulars, but he did not do so. It is, therefore, submitted that after verdict in view of the provisions of Section 1025 of the Revised Statutes and of the provisions of Section 269 of the Judicial Code, as amended February 26, 1919, the indictment in the present case must be held sufficient to support the conviction.

2. BUT ONE OFFENSE WAS CHARGED IN THE INDICTMENT; IT WAS PROPERLY CHARGED AGAINST TWO PERSONS.

In the indictment it is specifically charged that the *defendants,* etc., did have in their possession a certain preparation and derivative of opium, to wit, one can morphine and one finger-stall containing approximately a total of 194 grains of morphine. There was thus a single charge of a single possession. The count was not rendered duplicitous merely from including in the description two or more items. The two items would constitute a single possession, since it was alleged that the possession of the defendants was at the same time and place. The defendant would have more ground to complain had the pleader adopted the contrary plan and charged the possession of the can in one count and the finger-stall in another; such pleading would have been improper.

Braden vs. U. S., 27 Fed. 441.

Nor is it significant, nor was it erroneous for the jury to find the defendant Johnson "guilty as charged," even if it were conceded that he did not have possession of all of the drugs mentioned in the indictment. He was shown to have possession of sufficient of the drugs to constitute the commission of the crime charged and thus he was properly so convicted. Counsel would not contend that if one were prosecuted for, say, larceny of a given amount

of money and it appeared that the defendant was guilty as to sufficient value as to make it larceny, but less than the amount charged, the defendant would be entitled to an acquittal or that the proper verdict would not be "guilty as charged."

Nor was it a defect in the indictment, rendering the count duplicitous for the charge to run against the two defendants Johnson and Croxall. It was possible for a joint possession. Since all persons concerned are to be charged as principals, it is very easy to conceive a situation where two defendants could be shown to be in possession of a given article. The case cited on this point by counsel,

U. S. vs. Deitrich, 126 Fed. 671,

presented a wholly different situation; it expressly appeared from the indictment in that case that one of the defendants was a *bribe-giver* and the other a *bribe-taker,* thus affirmatively showing that each one was charged with a crime different from the crime charged against the other. There is no such situation here.

3. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT.

There was a complete and perfect case made out against the defendant by the Government. It proved without conflict or controversy that on March 23, 1923, at San Francisco, the defendant had in his possession a can of morphine. He admitted the

possession and the ownership and admitted it at the time of the trial and does not now dispute it. It was also established that the can was not stamped as showing a tax paid.

The defendant was thus shown to have had in his possession one of the contraband drugs; accordingly, there arose the presumption of his violation of Section 8 of the Harrison Narcotic Act and also of a violation of Section 1 thereof. It is provided in Section 8 of the Act, Section 5459 Barnes Code, as follows:

> "It shall be unlawful for any person not registered under the provisions of this Act and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs; *and such possession or control shall be presumptive evidence of a violation of this Section and also of a violation of the provisions of Section 1 of this Act.*"

It thus appears that when the Government proved that defendant Johnson had possession of the can of morphine, it also submitted presumptive evidence of a violation of Section 8 under which the defendant was charged, as well as a violation of the provisions of Section 1 of the Act, that is to say, that the defendant, being a person required by the provisions of Section 1 to register with the Collector and pay the special tax, did not in fact register or pay the tax and, nevertheless, had possession of the contraband drugs.

Counsel for defendant Johnson does not submit any argument as to this phase of the statute further than to refer to the presumption as the "questionable presumption" set forth in Section 8 of the Act, etc. But statutory provisions of this character are not new and have been fully sustained. Such legislation is entirely valid and is to be given effect.

Luria vs. U. S., 231 U. S. 9, 58 L. Ed. 101.

Dean vs. U. S., 266 Fed. 694.

Gee Woe vs. U. S., 250 Fed. 428.

Baender vs. U. S., 260 Fed. 832.

Pierriero vs. U. S., 271 Fed. 912, 913.

The Pierriero case and the Dean case involved the "Harrison Narcotic Act" and the provisions of that Act making one fact *prima facie* evidence of another.

Nor is it significant that the defendant took the stand and denied in whole or in part that he was in any activity requiring registration. There would thus be presented merely a question for the jury. They were entitled to weigh his statement in light of the facts and reject it and accept the presumption if they were satisfied as to the truth of the latter. If the effect of similar presumptions could be wholly removed from a case by a mere denial on the part of an accused, they would be of little value. The true rule is that such evidence of the accused merely makes a conflict in the evidence.

4. THE INSTRUCTIONS PROPOSED BY DEFENDANT WERE INCORRECT AS STATEMENTS OF THE LAW AND PROPERLY REFUSED.

Complaint is made of the action of the court below in refusing to give three several instructions proposed by the defendant. It is very clear, however, that not one of the instructions so proposed was a correct statement of the law and thus that the court properly refused the same. A detailed consideration of the instructions so proposed will make this manifest.

Thus the first instruction so proposed, appearing at the bottom of page 55 of the Transcript of Record, was as follows:

> "You are instructed that there is no presumption of law created in the Act of December 17, 1914, as amended February 24, 1919, which is superior to or overcomes the presumption of innocence with which the defendant is clothed from the time of his arrest to the end of the jury's deliberations."

The court had already instructed the jury properly on the question of the presumption of innocence as appears from page 54 of the Transcript of Record. But the defendant sought to have the court tell the jury in effect that the presumption of innocence was superior to and displaced the presumption or rule of evidence created in Section 8 of the Act quoted.

In that section it was declared that the fact of possession

"shall be presumptive evidence"

of a violation of the section. As we have seen from the cases cited, this was a valid enactment and it was intended by Congress that the proof of the fact of possession to the jury's satisfaction would also operate as proof of the other facts and thus *displace* or overcome the presumption of innocence. Just as the presumption of innocence is to yield to proof, so is it to yield here to the proof of possession, both as to the fact of possession and as to the facts as to which the possession was stated to be presumptive evidence. If the law were as the court was asked to instrict the jury, the presumption declared in the Act could have been given no effect whatsoever, and the court would be obliged to instruct that the presumption in question, being overcome by the presumption of innocence, was to be disregarded and thus that the defendant be acquitted. Such an instruction is thus shown to be absurd.

The Fourth instruction proposed by the defendant, appearing at page 56 of the Transcript of Record, is similarly an incorrect statement of the law. Under Section 8 of the statute it was unlawful for the defendant to have possession of the narcotics, he being a person required to register, unless he had *both registered* and *paid* the special tax provided for by the Act. He must have done both to justify his possession, yet according to the instruction pro-

posed, he need have done but one of the two things. The jury were to be told in the sentence at the end of the instruction that unless it was established that the defendant had not paid the tax it was their duty to acquit. They were to be told in the previous sentence, substantially, that unless it were established that the defendant was required to register and failed to register he was to be acquitted. In other words, the proposed instruction meant that even if it were established that the defendant was a person required to register he was, nevertheless, entitled to be acquitted, unless it be further established that he did not register, while under the law such registration would not have constituted a defense unless he also had paid the tax. The defendant thus requested an instruction upon the whole case and failed to include the necessary elements. A reading of the instructions discloses that he adopted the theory that if there was a failure to establish either the non-registration or the non-payment of the tax he was entitled to an acquittal, while as a matter of fact the statute required him to do both if he were a person required to register.

The remaining instruction proposed by the defendant, appearing at the top of page 55 of the Transcript of Record, was also erroneous in that it was an instruction for a verdict upon the whole case and did not include all of the necessary elements or make provision for all possible conditions.

The original Act in question, approved December

17, 1914, appears at Volume 38 of the Statutes, page 785. Section 1 of that Act was substantially amended February 24, 1919, as appears from Volume 40 of the Statutes, page 1130. The section has since been re-enacted, but without any change. The section as it now exists, provides for a certain registration and declares that

> "Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or coca leaves, or any compound, salt, derivative or preparation thereof shall register," etc.

In the next following paragraph of the section the significant phrase is made use of

> "Is *engaged* in any of the *activities* above enumerated."

The phrase "engages in any of such activities" is thereafter repeated a couple of times. In a subsequent paragraph of the same section, in referring to the exemption of certain officials, use is made of the phrase "engaged in any of the businesses herein described shall not be required to register." In describing who shall be deemed a wholesale dealer, it is said that any person who "sells" or "offers for sale" any of said drugs. It is thus generally provided that any person who engaged in any of such activities is immediately required to register, and it is further significant that Section 8 is violated by any of such persons having possession of the drugs who has failed to register.

Accordingly, when a situation arises that any person is engaged in any of the said activities, that is to say, holds himself out to do any of the said things, or if any person has possession of the said drugs with intent to do anything of the things mentioned, although he may not as yet have sold, given away, dispensed or produced any of the said drugs, is, nevertheless, required to register.

Wherefore, we submit that it is clear that the obligation to register is not necessarily limited to persons who have at a past time either imported, produced, sold, dispensed or given away the said drugs, but it also required that any person who engaged in any of the said activities or holds himself out as ready to do so, or has made preparation, or has in his possession any of the drugs with intent to do so, is required to register, and thus within the provisions of Section 8 of the Statute here involved.

Turning to the instruction proposed, it is apparent that the substantial part of the proposal is couched in the past tense. The court was asked to tell the jury that if the defendant did not do the said things he was not required to register. Literally the language is not equivalent to the one in the Statute, for there it is provided that

"Every person who"

does one of the things, using the present tense, the language being appropriate to govern the case of a doing of business, or engaging in the said activity,

while the language of the instruction would only apply to a past act which might have been of an isolated character. The government was entitled to have the jury pass on the question as to whether the defendant was not in fact carrying on such calling or activity, although it might not have been able to definitely prove any single particular act in that respect as having already been done.

Thus in the case of

Gee Woe vs. U. S., 250 Fed. 428, 430,

occurs the significant declaration:

> "The defendant might be shown to be a dealer either by evidence of sales made by him or by evidence tending to show that he held himself out as engaging in the business of dispensing the drug. His being a dealer might well have been inferred from his suspicious conduct and from his receiving visitors at unreasonable hours, and the character of his premises and their occupants, though the jury were unconvinced that the particular sale relied upon by the government to sustain the second count of the indictment was in fact made. If the defendant was a dealer, the burden was upon him to show registry and payment of the special tax."

It thus appears that here, although the government might not be able to show that at a past time the defendant had sold or given them away, it had the right to have the jury infer that he held himself

out as ready to do so or, in other words, had engaged in the said activity.

The further call in the said instruction as to whether the defendant was merely a consumer, a user, or an addict to the use of narcotics, and had the narcotics in his possession for his own use would be an objectionable statement as in part argumentative and misleading. That a defendant is an addict is not a defense. An addict may engage in any of the said activities, as well as any other person, and in fact an addict is quite frequently a peddler.

We submit that a fair reading of the proposed instruction in the light of the quoted provisions of Section 1 of the Statute as that section now exists would show that the instruction proposed, being to some extent misleading, would have induced the jury to believe that the past failure of the defendant to do any of the things mentioned would have operated as a defense while, as we have seen, it is clear that the obligation to register comes before the doing of any of the said things and binds one who goes into any of the said activities in advance of his doing business.

An instruction of the type involved compelling an acquittal under certain circumstances should make provision for all contingencies. It is quite to be inferred from the testimony given that defendant Johnson stood ready to dispense or give away the drugs in his possession to his roommate Croxall, who was also an addict. The defendant had a sub-

stantial quantity of the prohibitive drugs and under the rule of evidence stated in the statute the jury had the right to infer from his possession that he at least stood ready to sell or dispense a portion of the same.

It is, therefore, respectfully submitted that the defendant had a fair trial in the court below, and that his conviction is free from error, that the indictment states an offense, that the case was proven, and that his sentence should, therefore, be affirmed.

Respectfully submitted,

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